

(3)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 183

A. P. GIANNINI, Administrator of the Estate
of Virgil D. Giannini, Deceased,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
SUPPORTING BRIEF.

GEORGE H. KOSTER,

300 Montgomery Street, San Francisco 4, California,

Counsel for Petitioner.

BAYLEY KOHLMEIER,

300 Montgomery Street, San Francisco 4, California,

Of Counsel.

FILED

JUN 27 1945

CHARLES ELMORE DROW

CLERK



Subject Index

	Page
Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.....	1
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Summary Statement of Facts and the Matter Involved.....	3
Questions Presented	6
Specification of Errors	7
Reasons relied on for the Allowance of the Writ.....	8
Brief in Support of Petition.....	9
(1) The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this court.....	9
(2) The decision of the Circuit Court of Appeals herein is in conflict in principle with decisions of other Circuit Courts of Appeals.....	13

Table of Authorities Cited

Cases	Pages
Brown v. U. S. (Ct. Cls. 1941), 37 F. Supp. 444.....	15
Commissioner v. Wemyss (1945), ... U. S., 65 S. Ct. 652	9, 12, 13, 14
Helvering v. Safe Deposit and Trust Co. of Baltimore (4 Cir. 1938), 95 F. 806.....	15
Merrill v. Fahs (1945), ... U. S., 65 S. Ct. 655..	9, 12, 13, 14
Taft v. Commissioner (6 Cir. 1937), 92 F. (2d) 667.....	15
Taft v. Commissioner (1938), 304 U. S. 351.....	14
Codes	
Internal Revenue Code:	
Section 811(c) (formerly Section 302(c) of the Reve- nue Act of 1926).....	11, 12
Section 811(j) (26 U.S.C.A.).....	4
Section 812(b)	13
Section 1002	13
Judicial Code, Section 240(a), as amended by the Act of February 13, 1925 (28 U.S.C.A. Sec. 347).....	2
Statutes	
Revenue Act of 1921, Section 402(c).....	13
Revenue Act of 1924, Section 302(c).....	13
Revenue Act of 1924, Section 303(a)(1).....	13
Revenue Act of 1926, Section 302(i).....	2, 4, 5, 6, 7, 9, 12, 13, 14
Revenue Act of 1926, Section 303(a).....	15
Revenue Act of 1932, Section 503.....	9, 11
Miscellaneous	
H.R. Rep. No. 179, 69th Cong. 1st Sess. pp. 28, 66 (Cum. Bull. 1939-1, Part 2, p. 261).....	14
Paul, Federal Estate and Gift Taxation, Vol. I, p. 599.....	14
Paul, Federal Estate and Gift Taxation, Vol. 1, p. 605....	15
Sen. Rep. No. 398, 68th Cong. 1st Sess. p. 35 (Cum. Bull. 1939-1, Part 2, p. 290).....	14

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1944

No.

A. P. GIANNINI, Administrator of the Estate
of Virgil D. Giannini, Deceased,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

*To the Honorable Harlan Fiske Stone, Chief Justice
of the United States, and to the Honorable Asso-
ciate Justices of the Supreme Court of the United
States:*

A. P. Giannini, Administrator of the Estate of
Virgil D. Giannini, deceased, prays that a writ of
certiorari issue to review the judgment of the United

States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on March 9, 1945, affirming a decision of the Tax Court of the United States.

OPINIONS BELOW.

The opinion of the Tax Court of the United States (R. 29-44) is reported in 2 T. C. 1160.

The opinion of the Circuit Court of Appeals (R. 99-104) is reported in 148 F. (2d) 285.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 9, 1945. Thereafter and within the time provided by the rules of said court, petitioner filed a petition for rehearing. The order denying rehearing was entered by the Circuit Court of Appeals on April 9, 1945. (R. 105.) The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A. Sec. 347.)

STATUTES INVOLVED.

Sections 302(c), 302(i) of the Revenue Act of 1926, as amended. Said statutes are set forth in full in the appendix to this petition.

**SUMMARY STATEMENT OF FACTS AND THE
MATTER INVOLVED.**

The action below is an appeal from a decision of the Tax Court of the United States affirming a determination of a deficiency in estate tax against the Estate of Virgil D. Giannini, deceased.

At the time of his death, Virgil D. Giannini was one of the beneficiaries of a trust, hereinafter referred to as the Giannini trust. Said trust was created on October 1, 1935 by the members of the Giannini family: A. P. Giannini, Clorinda A. Giannini, husband and wife, and their three children, L. M. Giannini, Virgil D. Giannini, and Claire Giannini Hoffman. (R. 9, 26.) The members of the Giannini family had owned all the stock of the Giannini Company which was dissolved in 1935 and the assets of which were distributed to the stockholders. The assets of the Giannini Company which were distributed to the stockholders consisted of real and personal properties which were encumbered with certain liabilities and had a net value of \$457,039.96. (R. 9, 26, 56.) After distribution said assets were held in undivided interests by the Gianninis. Each of the children owned a 9.25% interest valued at \$43,284.62 and the balance was owned by Mr. and Mrs. A. P. Giannini. (R. 9. 26.)

A. P. Giannini felt that the property could be handled better and would be worth more if kept together, and he suggested to the children that if they would put their interests in a trust he and Mrs. Giannini would contribute their shares and would retain no interest in the trust. Pursuant to and as the

result of said suggestion, a trust was created on October 1, 1935, and the properties received from the Giannini Company were transferred to said trust. (R. 56, 57.) The value of the interest contributed by Virgil D. Giannini was \$43,284.62. The total value of all the properties transferred to the trust, less the liabilities assumed was \$457,039.96. (R. 9, 26.)

According to the trust provisions the net income from the property was to be distributed in equal shares to the children, or, if any were deceased, to his nominee or nominees. (R. 73, 100.) Each beneficiary could name by will his natural child or children to take his interest in the trust upon his death. If no nominee was named, his interest would augment the shares of the surviving beneficiaries. (R. 74, 76, 100.)

Virgil D. Giannini died April 28, 1938, unmarried and without issue. In accordance with the terms of Section 811(j), 26 U.S.C.A. Internal Revenue Code, the administrator of decedent's estate, taxpayer herein, elected to value the gross estate of the decedent as of one year after death. No property of the family trust was reported in the estate tax return. The Commissioner of Internal Revenue questioned the return, found the value of the decedent's 9.25% interest in the trust one year after his death to be \$46,072.04, and included said amount in the gross estate under the provisions of Section 302(c) of the Revenue Act of 1926. (R. 21-22.)

The Tax Court found, and it has been unquestioned herein, that as of the time the trust was created, the

right of Virgil D. Giannini to receive for life one-third of the income from the trust property substantially exceeded in value the property transferred to the trust by him. (R. 39, 100.)

Petitioner contended before the courts below that since as a part of the entire transaction and as inducement for the transfer of his interest in the property to the trust, Virgil D. Giannini received for life one-third of the income from all the property of the trust, including the property transferred by Mr. and Mrs. A. P. Giannini, Virgil received consideration in money's worth within the meaning of Section 302(i) of the Revenue Act of 1926, as amended. Petitioner further contended that since the fair market value of Virgil's life estate in the income from the property transferred by Mr. and Mrs. A. P. Giannini exceeded the fair market value of the property which Virgil transferred to the trust, both at the time of the transfer and at the time of his death, under the terms of Section 302(i) of the Revenue Act of 1926, as amended, there was no excess value to be included in his gross estate for estate tax purposes.

The Tax Court and the Circuit Court of Appeals held that since the transfers by Mr. and Mrs. A. P. Giannini to the trust were gifts by them to their children, they did not constitute consideration received by Virgil for his transfer within the meaning of Section 302(i) of the Revenue Act of 1926, as amended.

QUESTIONS PRESENTED.

(1) Where at the suggestion of his parents a man transfers property to a trust of which he and his brother and sister are beneficiaries with a life interest in the income of the trust, and the parents also transfer property to the trust but retain no interest therein and the son's life interest in the income from the property transferred by his parents has a fair market value which exceeds the value of the property which he transfers to the trust, does the son receive consideration for his transfer to the trust within the meaning of Section 302(i) of the Revenue Act of 1926?

(2) Does the fact that the transfers to the trust by the trustors who retain no beneficial interest in the trust are gifts within the meaning of the Gift Tax Act prevent the interest in the income therefrom which is received by a trustor-beneficiary from constituting consideration for the transfer of property to the trust by such trustor-beneficiary within the meaning of Section 302(i) of the Revenue Act of 1926, as amended?

(3) Does the fact that a payment of money or property to the decedent for his transfer of property was made in a transaction which was a gift by the payor for gift tax purposes preclude such money or property received by the decedent from being recognized as "consideration received" within the meaning of those words as used in that portion of Section 302(i) of the Revenue Act of 1926, which reads as follows: "there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on

account of such transaction, over the value of the consideration received therefor by the decedent”?

SPECIFICATION OF ERRORS.

In making and rendering its decision herein the Circuit Court of Appeals committed the following errors upon which your petitioner relies.

The Circuit Court of Appeals erred: .

(1) In determining that a payment of money or property to a decedent for his transfer of property under circumstances which make the payment a gift by the payor for gift tax purposes cannot constitute consideration received by the decedent within the meaning of Section 302(i) of the Revenue Act of 1926 as amended.

(2) In determining that the life interest in the income of the Giannini Trust which was received by Virgil D. Giannini and had an admitted value in excess of the fair market value of the property which he transferred to the trust did not constitute consideration received by him for the transfer of his property to said trust within the meaning of Section 302(i) of the Revenue Act of 1926, as amended.

(3) In affirming the decision of the Tax Court of the United States in favor of respondent.

**REASONS RELIED ON FOR THE ALLOWANCE
OF THE WRIT.**

(1) The Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this court.

(2) The decision of the Circuit Court of Appeals herein is in conflict in principle with decisions of other Circuit Courts of Appeals.





BRIEF IN SUPPORT OF PETITION.

- (1) THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The phrase "adequate and full consideration in money or money's worth" has been and now is used in several different sections of the estate tax and gift tax laws¹ and the determination of whether adequate and full money consideration has been received frequently determines whether a particular transaction is subject to tax and the amount of the estate or gift tax due. The proper interpretation of the phrase is important to the administration of both the estate tax and the gift tax.

This court recently considered the meaning of said phrase in connection with gift taxes and held that since the gift tax is supplemental to the estate tax the two laws must be considered *in pari materia* and the phrase "adequate and full consideration in money or money's worth" must be given the same interpretation in both laws.

Commissioner v. Wemyss (1945), U. S., 65 S. Ct. 652;

Merrill v. Fahs (1945), U. S., 65 S. Ct. 655.

In the *Wemyss* case, *supra*, this court stated that "the section taxing as gifts transfers that are not

¹Sections 302(c), 302(i), and 303(a) of the Revenue Act of 1926 (now Sections 811(c), 811(i) and 812(b) of the Internal Revenue Code); Section 503 of the Revenue Act of 1932 (now Section 1002 of the Internal Revenue Code).

made for 'adequate and full (money) consideration' aims to reach those transfers which are withdrawn from the donor's estate" and determined that mere detriment to the donee did not constitute adequate and full consideration in money or money's worth within the meaning of the law. Since the two laws are *in pari materia* and are to be given the same interpretation it would seem that the same purpose and test would be applicable in the interpretation of the corresponding provisions in the estate tax law.

In the present case the transfer by Virgil D. Giannini of his property interest to the Giannini Trust as his part of the transaction between him, his parents and his brother and sister did not reduce his estate but actually increased it. The unquestioned facts establish that the interest which he received under the trust had a fair market value substantially in excess of the fair market value of the property which he transferred. He transferred an interest in property to the trust which had a fair market value of \$43,284.60 at the time of the transfer and a fair market value of \$46,072.04 one year after his death and received an interest in the trust which had a fair market value substantially in excess of said amounts (R. 100) (approximately \$70,000. (R. 71).) The situation was no different in substance than it would have been if his parents had given Virgil \$70,000 in cash as their part of the transaction instead of transferring their interest in the property to the trust. These unquestioned facts clearly establish that the transaction did not reduce Virgil's estate and was not of the type which the statute was intended to tax.

The transfer in question in the present case was made by Virgil and whether or not the property transferred should be included in his estate for estate tax purposes depends upon whether he received an adequate and full consideration in money or money's worth within the meaning of the law. The Circuit Court of Appeals refused to attach any importance to the fact that as the result of the transaction, Virgil received a property interest which had a fair market value in excess of the value of the property which he transferred. The Circuit Court attached much more importance to the fact that the parents received no consideration in money or money's worth for the property which they transferred and that their transfer was therefore a gift within the meaning of Section 503 of the Revenue Act of 1932. The Circuit Court reasoned that since the transfer by the parents was a gift for gift tax purposes, it could not constitute consideration to Virgil for the transfer which he made.

The interpretation adopted by the Circuit Court is extremely technical and completely disregards the real purpose of the law and might well result in the inclusion in the estate of a decedent of not only property transferred in a transaction which comes within the scope of Section 811(c) of the Internal Revenue Code (formerly Section 302(c) of the Revenue Act of 1926) but also the inclusion of the entire consideration received for the transfer. For example, suppose A gave B \$50,000 to transfer property having an equal value to a trust of which B was the beneficiary for life and C was the remainderman. If B died possessed

of the \$50,000, under the decision of the Circuit Court herein both the property transferred and the \$50,000 would be included in B's estate for estate tax purposes. The transfer to the trust would be included under Section 811(c) of the Internal Revenue Code since the \$50,000 received would be a gift by A for gift tax purposes and according to the Circuit Court would not constitute consideration to B for the transfer.

Such interpretation not only finds no support in the wording, the purpose or the history of the law but results in an extremely inequitable tax and appears to be inconsistent with the principle applied by this court in *Commissioner v. Wemyss*, supra, and *Merrill v. Fahs*, supra.

Section 302(i) of the Revenue Act of 1926 contains no such qualification or limitation. Said section by its terms applies in any case in which a person who makes a transfer described in subdivisions (c), (d), and (f) of said Section 302 for which consideration in money or money's worth *is received*, but which is not a bona fide sale for an adequate and full consideration in money or money's worth. The law is concerned only with whether the person who made the transfer involved received consideration. There is no indication in the law or its history that it is in any way material that the payment of the consideration received may or may not have constituted a gift for gift tax purposes by the person from whom the consideration was received.

Section 302(i) of the Revenue Act of 1926, as amended, has been incorporated in the Internal Reve-

nue Code as Section 811(i). The proper interpretation of that section is important to the administration of the Federal Estate Tax. This court has never had occasion to pass upon the question here involved. Section 812(b) and Section 1002 of the Internal Revenue Code likewise contain similar wording which undoubtedly require a similar interpretation to that given to Section 811 (i). See *Commissioner v. Wemyss*, supra, and *Merrill v. Fahs*, supra.

It is respectfully submitted that the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this court.

**(2) THE DECISION OF THE CIRCUIT COURT OF APPEALS
HEREIN IS IN CONFLICT IN PRINCIPLE WITH DECISIONS
OF OTHER CIRCUIT COURTS OF APPEALS.**

In addition to subdivisions (c) and (i) of Section 302 of the Revenue Act of 1926, Section 303(a) of said Act also contained the phrase "adequate and full consideration in money or money's worth" in limiting the claims, mortgages and indebtedness which were deductible for estate tax purposes. Such limitation on deductions was first inserted in the law by Section 303(a)(1) of the Revenue Act of 1924, when Congress added the requirement that claims must have been incurred for a "fair consideration in money or money's worth". The Committee Reports state that the purpose of the 1924 amendment was to impose the same limitation upon deductions as was imposed by Section 402(c) of the Revenue Act of 1921 (and 302(c) of the

Revenue Act of 1924) upon transfers in contemplation of or intended to take effect at or after death. H.R. Rep. No. 179, 69th Cong. 1st Sess. pp. 28, 66 (Cum. Bull. 1939-1, Part 2, p. 261). Sen. Rep. No. 398, 68th Cong. 1st Sess. p. 35 (Cum. Bull. 1939-1, Part 2, p. 290). See also *Taft v. Commissioner* (1938), 304 U. S. 351, 356. Paul, Federal Estate and Gift Taxation, Vol. I, p. 599. The Revenue Act of 1926 changed the limitation in Section 302(c) and 303(a) from "fair consideration" to "adequate and full consideration" and added Section 302(i) which also contained the phrase "adequate and full consideration in money or money's worth". (See Revenue Act of 1926, Sections 302(c), 302(i) and 303(a).)

The statutory history of the above sections of the estate tax law as well as the identical wording and close relationship of the sections shows quite clearly that Congress intended the phrase "adequate and full consideration" to have the same meaning and receive the same interpretation in each of the sections of the law in which it was used. See *Commissioner v. Wemyss*, *supra*, and *Merrill v. Fahs*, *supra*.

In several cases the Commissioner of Internal Revenue has disallowed the deduction for estate tax purposes of claims for unfulfilled pledges to charitable or educational institutions on the ground that the claims were not incurred for an adequate and full consideration in money or money's worth. The prevailing rule as established by the decisions is that where such pledges were made in consideration of similar pledges by other parties such other pledges constitute adequate

and full consideration in money or money's worth within the meaning of Section 303(a) of the Revenue Act of 1926.

Helvering v. Safe Deposit and Trust Co. of Baltimore (4 Cir. 1938), 95 F. 806;

Taft v. Commissioner (6 Cir. 1937), 92 F. (2d) 667.

See also:

Brown v. U. S. (Ct. Cls. 1941), 37 F. Supp. 444;

Paul, Federal Estate and Gift Taxation, Vol. 1, p. 605.

In each of the cases cited above the pledge which was held to constitute adequate and full consideration for the claim against the estate of the decedent was unquestionably a gift. While the courts did not discuss that feature of the cases the gift was so apparent that it could not have been overlooked and must have been considered unimportant by the courts. The fact that the donee was a charitable or educational institution and the gift was therefore deductible for gift tax purposes does not alter the fact that it was a gift. Under the reasoning of the Circuit Court of Appeals in the present case, the mere fact that the pledges by the other parties were gifts would prevent them from constituting consideration.

It is respectfully submitted that the conclusion of the Circuit Court of Appeals below that a gift cannot constitute consideration is in direct conflict with the decisions cited above in which it was held that a gift or pledge to make a gift constituted adequate and full consideration in money or money's worth for a similar

pledge by another and met the requirements of Section 303(a) of the Revenue Act of 1926.

It is respectfully submitted that this petition should be granted.

Dated, San Francisco, California,
June 18, 1945.

GEORGE H. KOSTER,
Counsel for Petitioner.

BAYLEY KOHLMEIER,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, George H. Koster, counsel for petitioner, hereby certify that the petition for a writ of certiorari herein is well founded, is filed in good faith and is not interposed for delay.

Dated, San Francisco, California,
June 18, 1945.

GEORGE H. KOSTER,
Counsel for Petitioner.

(Appendix Follows.)



Appendix

STATUTES INVOLVED.

Revenue Act of 1926—Section 302 (as amended by Section 404 of the Revenue Act of 1934). The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—* * *

Section 302(c) (as amended by Joint Resolution of March 3, 1931, Public, No. 131, Seventy-first Congress, and by Section 803(a) of the Revenue Act of 1932). To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior

to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *

Section 302(i). If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subdivisions (c), (d), and (f) of this section is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.



Due service and receipt of a copy of the within is hereby admitted

this.....day of June, 1945.

Attorney General of the United States,

Assistant Attorney General of the United States,

Chief Counsel of the Bureau of Internal Revenue,

Solicitor General of the United States,
Counsel for Respondent.





INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	2
Statement.....	3
Argument.....	5
Conclusion.....	9

CITATIONS

Cases:

<i>Carney v. Benz</i> , 90 F. 2d 747.....	8
<i>Choate v. Commissioner</i> , 324 U. S. 1.....	7
<i>Commissioner v. Wemyss</i> , 324 U. S. 303.....	7, 9
<i>Helvering v. Safe Deposit & Trust Co. of Baltimore</i> , 95 F. 2d 806.....	8
<i>Merrill v. Faha</i> , 324 U. S. 308.....	7
<i>Robinette v. Helvering</i> , 318 U. S. 184.....	8
<i>Taft v. Commissioner</i> , 92 F. 2d 667.....	8
<i>Taft v. Commissioner</i> , 304 U. S. 351.....	9

Statutes:

Internal Revenue Code:	
Sec. 811 (f).....	8
Sec. 812 (b).....	9
Revenue Act of 1926, c. 27, 44 Stat. 9, as amended:	
Sec. 302.....	2, 6
Sec. 303.....	8, 9
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 503.....	7
Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 406.....	9

(1)

10.11.1917

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

2

3

4

5

6

7

8

9

10

11

12

13

14

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 183

A. P. GIANNINI, ADMINISTRATOR OF THE ESTATE OF
VIRGIL D. GIANNINI, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 32-44) is reported at 2 T. C. 1160. The opinion of the Circuit Court of Appeals (R. 99-104) is reported at 148 F. 2d 285.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 9, 1945 (R. 104-105), and a petition for rehearing was denied on April 9, 1945 (R. 105). The petition for a writ of certiorari was filed on June 27, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Decedent, his brother and sister, and their parents transferred property to a family trust. The decedent and his brother and sister were made beneficiaries of the trust and no interest was retained by the parents. The question is whether the value of the transfer to the trust by decedent is includible in his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, or whether the transfer was made for a consideration in money or money's worth and is therefore exempt from inclusion under either Section 302 (c) or Section 302 (i) of the Revenue Act of 1926, as amended.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 803]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he

has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(i) If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subdivisions (c), (d), and (f) of this section is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

STATEMENT

In 1935, decedent, his brother and sister and their parents conveyed certain property to the Bank of America National Trust and Savings Association, as trustee, in execution of an irrevocable trust (R. 35, 62-85). The property so con-

veyed had formerly been held by the A. P. Giannini Company, a family corporation whose stock was solely owned by the grantors of the trust here involved (R. 34). Upon dissolution of that company, decedent's parents, desiring to make permanent provision for their children and believing that the property would be of greater value if kept together, suggested that if the children would convey their property to a trust they would do likewise and would retain no interest in the trust (R. 34-35).

Decedent and his brother and sister were named beneficiaries of the trust (R. 35-36, 73). No interest was retained by the parents (R. 82). Under the terms of the trust instrument the net income of the trust was to be paid in equal shares to the beneficiaries, or, if any were deceased, to their nominee or nominees (R. 73-74). Each beneficiary possessed the right to nominate by will his natural child or children to succeed to his interest in the trust upon his death, and if no nominee was appointed the beneficiary's interest was to augment the respective shares of the remaining beneficiaries (R. 74-75). The beneficiaries signed the following statement on the trust instrument (R. 85): "The undersigned, being beneficiaries named in the foregoing Trust Agreement, hereby accept the gifts therein declared."

The property conveyed to the trust had an aggregate net value of \$457,039.96. Decedent and

his brother and sister each contributed \$43,248.62, or 9.25 percent of this amount, and the parents contributed the remainder (R. 35). The net income from the trust averaged more than nine percent per year, and the fair value of the right of decedent to receive one-third of the income from the trust for life was found to be substantially in excess of his contribution (R. 39).

On April 28, 1938, decedent died without issue (R. 33-34), his interest in the trust then passing to his brother and sister (R. 37). In the estate tax return filed by petitioner, the property which decedent had transferred to the family trust was not reported (R. 21). The Commissioner of Internal Revenue held that this transfer was includible in the gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, and determined a deficiency in decedent's gross estate of \$46,072.04, an amount representing 9.25 percent of the net value of the trust on its basic valuation date (R. 22, 39). The Tax Court sustained the Commissioner's determination (R. 40-44) and the Circuit Court of Appeals upheld the Tax Court (R. 99-104).

ARGUMENT

Since the decedent retained the right to receive income for life from the property which he transferred to the trust, and since his interest in the property passed to his brother and sister upon his death, the value of the property is includible in

his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, *supra*, pp. 2-3. That Section provides, however, that transfers which constitute a "bona fide sale for an adequate and full consideration in money or money's worth" shall not be includible in the gross estate. And if the transfer is not "a bona fide sale for an adequate and full consideration in money or money's worth" but is "for a consideration in money or money's worth," only the excess of the value of the property over the consideration received is includible in the gross estate under Section 302 (i) of the Revenue Act of 1926, as amended, *supra*, p. 3. The courts below properly held that the transfer made by the decedent to the trust was not exempt from taxation under either of these exclusion provisions.

Inasmuch as decedent's parents contributed the bulk of the trust property and retained no interest in it, decedent acquired a financial interest in the family trust greater than the value of the property he transferred. It does not follow, however, that the parents' contribution constituted "consideration in money or money's worth" for decedent's transfer within the meaning of the statute. On the contrary, the facts clearly demonstrate that the transfer by decedent's parents to the trust was a gift, and not consideration for the decedent's transfer. The family nature of the settlement, the parental desire to provide for their

children, the absence of any evidence as to bargaining, and decedent's express acceptance of the trust as a gift are consonant only with this view. The Tax Court stated that it had "searched the record in vain for any indication of a quid pro quo" (R. 42), and the Circuit Court of Appeals concluded that the facts did not show any "consideration in money or money's worth for the decedent's transfer of property to the trust" (R. 102). This finding as to the nature of the transaction, being supported by the evidence, is conclusive. Cf. *Choate v. Commissioner*, 324 U. S. 1.

Moreover, the court below held that the transfer by decedent's parents was a gift within the meaning of the gift tax law, Section 503 of the Revenue Act of 1932, c. 209, 47 Stat. 169. Since the parents' transfers were not supported by consideration in "money or money's worth," this holding was correct under the recent decisions of this Court in *Commissioner v. Wemyss*, 324 U. S. 303, and *Merrill v. Fahs*, 324 U. S. 308. This is an additional ground buttressing the conclusion that the parents' transfers did not constitute "consideration" for decedent's transfer for estate tax purposes.

Inclusion of the decedent's transfer in his gross estate is entirely consistent with the policy of the estate tax. In establishing a requirement of "consideration in money or money's worth," Congress had in mind the exclusion of "family contracts

and similar undertakings made as a cloak to cover gifts." *Carney v. Benz*, 90 F. 2d 747, 749 (C. C. A. 1st). The instant facts clearly savor of a family settlement rather than the arms-length bargaining contemplated by the statute to relieve a decedent's estate of taxation. Cf. *Robinette v. Helvering*, 318 U. S. 184. As stated by the Circuit Court of Appeals, the value of the interest received by decedent as a result of the transfer came "not from bargaining but from the largess of the parents in donating a substantial sum for their children's financial security" (R. 102). Finally, it would defeat the purpose of the statute if decedent's transfer were exempted from the estate tax by treating as consideration the alleged *quid pro quo* received when none of it could by any possibility become a part of the decedent's estate. (See 26 U. S. C. 811 (f).)

There is no conflict with *Helvering v. Safe Deposit & Trust Co. of Baltimore*, 95 F. 2d 806 (C. C. A. 4th), and *Taft v. Commissioner*, 92 F. 2d 667 (C. C. A. 6th) (Pet. 15) involving the question whether pledges made by a decedent to charitable or educational institutions in consideration of similar pledges by others were deductible claims against the estate within the scope of Section 303 (a) (1) of the Revenue Act of 1926. Those cases merely held that since the consideration involved was reducible to money or money's worth, such consideration need not benefit the decedent

to constitute "adequate and full consideration in money or money's worth" within the meaning of that Section.¹ The issue presented in the instant case involving a different provision and different legislative purpose, is patently distinguishable.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
HELEN R. CARLOSS,

Special Assistants to the Attorney General.

JULY 1945.

¹ Such a holding may be open to question in view of this Court's construction of the statute in *Taft v. Commissioner*, 304 U. S. 351, holding non-deductible independent pledges to charitable and educational institutions which were legally enforceable against the decedent's estate. See also *Commissioner v. Wemyss*, 324 U. S. 303. Moreover, the courts in both cases cited by petitioner were no doubt influenced by the fact that an actual bequest to the charitable institutions would have been deductible under Section 303 (a) (3) of the Revenue Act of 1926; and it may be noted that Congress has now amended the statute in order to permit a deduction in the case of all enforceable pledges to such institutions which would be deductible if they were bequests. See Section 406 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, amending Section 812 (b) of the Internal Revenue Code.